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Check Clearing for the 21st Century Act: The Impact on Consumers

I. INTRODUCTION

In the days following the September 11, 2001, terrorist attacks, the Federal Reserve Banks' daily check float¹ swelled from a few hundred million dollars to almost \$50 billion.² The attacks grounded the nation's airplanes, preventing the transportation of checks among banks.³ As a result, banks were unable to transport and clear checks, leading to the dramatic increase in daily float.⁴ This tragic event highlighted a growing problem for our nation's payments system.⁵ Banks and other financial institutions were unable to take advantage of new technology to promote efficiency in the banking industry.⁶ To solve this problem, Congress passed the Check Clearing for the 21st Century Act (Check 21).⁷

Although the Act is necessary and beneficial for the banking industry, it does create some potential pitfalls for consumers.⁸ This note will examine whether Check 21 is unfairly detrimental to consumers in its pursuit of efficiency and monetary savings for financial institutions.⁹ This note will also discuss several simple policy changes urged by consumer advocates that may remedy these unfavorable consumer

1. Fed. Res. Bank of N.Y., *Check Clearing and Float*, available at <http://www.newyorkfed.org/aboutthefed/fedpoint/fed08.html>. Float is money in the banking system that appears simultaneously in the Federal Reserve accounts of two depository institutions for a brief time because of delays in processing checks (last modified Oct. 14, 2004). *Id.*

2. *Check Clearing for the 21st Century Act: Hearing on H.R. 5414 Before the House Subcomm. on Fin. Inst. and Consumer Credit*, 107th Cong. (2002) (testimony of Roger W. Ferguson, Vice Chairman, Fed. Res. Bd.) [hereinafter *Hearing on H.R. 5414*].

3. *See id.* at 8.

4. *See id.* at 8.

5. 149 CONG. REC. H4996 (2003) (statement of Rep. Hart).

6. *See Hearing on H.R. 5414, supra* note 2.

7. *See* Check Clearing for the 21st Century Act, 12 U.S.C.A. § 5001(b) (2003) (listing purposes of the Act).

8. *See infra* notes 110-217 and accompanying text.

9. *See infra* notes 49-217 and accompanying text.

effects of Check 21.¹⁰ Part II of this note provides a brief overview of the Check 21 legislation.¹¹ Part III discusses the advantages and disadvantages for financial institutions as a result of Check 21.¹² Part IV describes the advantages for consumers as a result of Check 21.¹³ Finally, Part V discusses the potential pitfalls that consumers face as a result of Check 21 and the policy changes urged by consumer advocates that may lessen the detrimental effects on consumers and thus ease consumer worries.¹⁴

II. BRIEF OVERVIEW OF CHECK 21

A. *The Law Prior to the Passage of Check 21*

Prior to the passage of Check 21 on October 28, 2004, banks and other financial institutions had to physically present an original paper check in order to receive payment.¹⁵ Banks were not allowed to truncate¹⁶ the paper check and send an electronic version unless they had a special arrangement with the other institutions that were a part of the transaction.¹⁷ However, with over 15,000 banks, thrifts, and credit unions, it was nearly impossible for any one bank to negotiate such agreements with all or even a large portion of the other financial institutions.¹⁸ This meant that billions of paper checks were either trucked or flown around the country to complete the clearing process.¹⁹ The terrorist attacks of September 11, 2001, demonstrated the problem with this system and underscored the importance of reducing reliance on the transportation of paper checks.²⁰ Congress passed Check 21 to

10. See *infra* notes 110-217 and accompanying text.

11. See *infra* notes 15-48 and accompanying text.

12. See *infra* notes 49-76 and accompanying text.

13. See *infra* notes 77-109 and accompanying text.

14. See *infra* notes 110-217 and accompanying text.

15. S. REP. NO. 108-79, at 1 (2003).

16. "Truncate" means to remove an original check from the forward collection or return process and send to a recipient, in lieu of such original check, a substitute check or, by agreement, information relating to the original check, whether with or without the subsequent delivery of the original. 12 C.F.R. § 229.2(ddd) (2004).

17. See 149 CONG. REC. H4996 (2003) (statement of Rep. Hart).

18. *Hearing on H.R. 5414, supra* note 2.

19. S. REP. NO. 108-79, at 2.

20. See *id.*

help solve the above problem and reduce the costs to financial institutions associated with the transportation of checks.²¹

B. The Mechanics of Check 21

Check 21 allows banks and other financial institutions to truncate paper checks and instead transmit electronic images of the checks through the check clearing process.²² Any bank at any point in the check clearing process may remove the original paper check and transmit an electronic image of the check.²³ A special agreement between the financial institutions is not necessary under Check 21.²⁴ However, Check 21 does not mandate that banks and other financial institutions receive checks in electronic form.²⁵ At any point in the process, if a financial institution insists on a paper copy instead of an electronic image, Check 21 allows the use of a substitute check.²⁶

The substitute check is a paper copy created from the electronic image of the original check.²⁷ The substitute check is the legal equivalent of the original check so long as it accurately represents all of the information on the front and back of the original check at the time of truncation.²⁸ The substitute check must also bear the legend: "This is a legal copy of your check. You can use it the same way you would use the original check."²⁹ The substitute check is also subject to any provision of the Uniform Commercial Code or applicable federal or state law as if such substitute check were the original check, but only to the extent such provision of law is not inconsistent with Check 21.³⁰

21. See 12 U.S.C.A. § 5001(b) (2003); see also 149 CONG. REC. H5002 (2003) (Check 21 passed unanimously in the House of Representatives); see also 149 CONG. REC. D1186 (2003) (Check 21 signed into law by President Bush on Oct. 28, 2003).

22. Mark Budnitz, *New Check 21 Act: Banks No Longer Will Return Original Cancelled Checks*, available at <http://www.consumerlaw.org/initiatives/check21.shtml> (last visited Jan. 5, 2005).

23. *Id.*

24. 12 U.S.C.A. § 5003(a) (2003).

25. See 149 CONG. REC. S12,632 (2003).

26. *Id.*

27. S. REP. NO. 108-79, at 2 (2003).

28. 12 U.S.C.A. § 5003(b) (2003).

29. *Id.*

30. 12 C.F.R. § 229.51(c) (2004).

Further, the substitute check is machine-readable and bears the magnetic-ink character recognition (MICR) line.³¹ This allows a bank to process the substitute check with its pre-existing equipment.³² A bank that chooses not to participate in electronic imaging is not required to invest in new equipment and technology.³³ Check 21 is designed to facilitate check truncation³⁴ without requiring banks to fully convert to an electronic process on either end of the clearing process.³⁵

Under Check 21, banks and other financial institutions may also provide a substitute check to consumers.³⁶ Consumers can no longer demand the return of their original checks.³⁷ Check 21 does not require the destruction of the original paper check.³⁸ This is true even if a financial institution chooses to remove the paper check from the collection process and use an electronic image instead.³⁹ If the original paper check still exists, the financial institution may return it to the consumer.⁴⁰ However, Check 21 does not require a bank to return the original paper check, even if the consumer requests it.⁴¹ As with other financial institutions, the substitute check is the legal equivalent of the consumer's original check provided it meets the requirements set forth in the Act.⁴²

Check 21 also imposes warranty and indemnity obligations upon the financial institution issuing the substitute check and any financial institution that transfers, presents, or returns a substitute check.⁴³ These obligations are intended to compensate consumers,

31. S. REP. NO. 108-79, at 2; *see also* Elfring Fonts, *What is MICR*, available at <http://www.micrfont.com/what.htm> (last visited Jan. 5, 2005). The Magnetic Ink Character Recognition (MICR) is the bottom line printed on a check that allows the check information to be automatically read by machines. *Id.*

32. *See* S. REP. NO. 108-79, at 2.

33. *See id.*

34. *See supra* note 16.

35. *See* S. REP. NO. 108-79, at 2.

36. 12 U.S.C.A. § 5003(a) (2003).

37. *Id.*

38. Letter from J. Benjamin Davis, Attorney, Brooks, Pierce, L.L.P., to Paul Stock, Executive Vice President, N.C. Bankers Ass'n (July 14, 2004) (on file with author).

39. *Id.*

40. *Id.*

41. 149 CONG. REC. S12,632 (2003).

42. 12 U.S.C.A. § 5003(b) (2003).

43. 12 U.S.C.A. §§ 5004-5005 (2003).

banks, and other processors for losses caused by the creation of the substitute check.⁴⁴ A bank that transfers, presents, or returns a substitute check and receives payment, warrants that the check complies with the requirements for legal equivalence under the Act, and the person that makes payment based on receipt of the substitute check will not receive another version of that check for payment.⁴⁵

Further, any bank that creates a substitute check and any bank that receives payment for transfer of either an electronic or paper version of the check indemnifies all subsequent persons who receive the substitute check and incur a loss due to the receipt of the substitute check instead of an original check.⁴⁶ The Act also provides for a right of expedited recredit⁴⁷ if a customer asserts that the electronic check or substitute check was improperly charged against his or her account.⁴⁸

III. CHECK 21: ADVANTAGES AND DISADVANTAGES FOR FINANCIAL INSTITUTIONS

A. *Advantages*

The primary purpose of Check 21 is “to foster innovation in the check collection system . . . [and] to improve the overall efficiency of the Nation’s payments systems.”⁴⁹ Less than fifty years ago, clerks sorted millions of checks each day by hand.⁵⁰ The introduction of mechanical high-speed check processing equipment in the 1960s led to quicker and more efficient sorting of checks.⁵¹ New electronic technologies of the present, such as digital imaging, can further improve check-processing efficiency.⁵² Check 21 allows the banking industry to

44. See S. REP. NO. 108-79, at 2.

45. 12 U.S.C.A. § 5004; see also S. REP. NO. 108-79, at 3.

46. 12 U.S.C.A. § 5005(a); see also S. REP. NO. 108-79, at 4.

47. Consumers Union, *Questions and Answers About the Check Clearing for the 21st Century Act*, at <http://www.consumersunion.org/finance/ckclear1002.htm> (July 27, 2004) [hereinafter Consumers Union]. “Recredit” means that the money is put back in the account. *Id.*

48. 12 U.S.C.A. § 5006(a) (2003); see also H.R. REP. NO. 108-132, at 11 (2003).

49. 12 U.S.C.A. § 5001(b) (2003).

50. *Hearing on H.R. 5414, supra* note 2.

51. *Id.*

52. See *id.*

take advantage of these technological advances.⁵³

Prior to Check 21, banks were required to present and return original checks to receive payment.⁵⁴ On average, a check presented to a retailer or bank was handled over fifteen times.⁵⁵ Each step of that process required the physical transportation of the checks, resulting in a significant amount of travel time.⁵⁶ In light of the ability to process and transmit checks electronically, it is inefficient and time-consuming to take several days to ship original checks by land or air.⁵⁷ One banker testified that “[e]xpanding the use of electronics in check processing will help streamline the collection and return of checks.”⁵⁸ Senator Sarbanes⁵⁹ stated that “banks have also indicated that they will be able to reduce processing time and may be able to identify more quickly check fraud and bank errors.”⁶⁰

Electronic processing of checks will also provide cost-savings for financial institutions.⁶¹ While the banks may have to make an initial technology investment for the electronic-imaging equipment, they will save money on processing and transportation of paper checks.⁶² According to testimony before Congress, one major bank spends \$25 million annually on courier services for transporting original checks.⁶³ Several members of the banking industry testified before Senate and House Committees regarding the cost-savings from Check 21.⁶⁴ One banker testified that “[t]he processing of checks is an enormously

53. See H.R. REP. NO. 108-132, at 10 (2003).

54. S. REP. NO. 108-79, at 2 (2003).

55. *Check Clearing for the 21st Century Act: Hearing on H.R. 5414 Before the House Subcomm. on Fin. Inst. and Consumer Credit*, 107th Cong. (2002) (testimony of Lee Schram, Vice President, Payment & Imaging Solutions Division, NCR Corporation) [hereinafter Testimony of Schram].

56. See 149 CONG. REC. H4996 (2003).

57. See *Check Clearing for the 21st Century Act, Hearing on H.R. 5414 Before the House Subcomm. on Fin. Inst. and Consumer Credit*, 107th Cong. (2002) (testimony of Curtis Hage, Chairman and CEO, Home Federal Bank) [hereinafter Testimony of Hage].

58. *Id.*

59. Paul S. Sarbanes, Democratic Senator from Maryland, available at <http://www.sarbanes.senate.gov> (last visited Jan. 5, 2005).

60. 149 CONG. REC. S12,632 (2003).

61. See *Hearing on H.R. 5414*, *supra* note 2.

62. See S. REP. NO. 108-79, at 2 (2003).

63. Testimony of Schram, *supra* note 55.

64. See *infra* notes 65-66 and accompanying text.

expensive and labor-intensive process.”⁶⁵ Another testified that his company implemented check imaging in 1999 and “[t]he benefits have been enormous . . . imaging has led to significant cost reduction, particularly in postage expenses.”⁶⁶

The September 11, 2001, attacks demonstrated the risk of delay and loss that also can result from a system that requires the transportation of original checks.⁶⁷ Had a robust electronic infrastructure for check collection been in place at the time, banks would have been able to collect and present checks electronically, avoiding the transportation crisis that prevented the clearing of \$47 billion in transactions.⁶⁸ As one Senator stated, “[T]he widespread adoption of check truncation and electronic imaging will reduce the dependence of the check processing system on transportation and will increase the resiliency of the financial system to terrorist attacks or other unforeseen events.”⁶⁹

B. Disadvantages

One potential disadvantage for financial institutions stemming from a system of check truncation and electronic imaging involves the cost of the necessary equipment to implement the system.⁷⁰ One consulting firm estimates that the implementation of Check 21 will cost the banking industry as much as \$10 billion in the next three to five years.⁷¹ Check 21 attempts to eliminate this potential problem by providing for a new negotiable instrument, a substitute check.⁷² Check

65. Testimony of Hage, *supra* note 57.

66. *Check Clearing for the 21st Century Act: Hearing on H.R. 1474 Before the House Subcomm. on Fin. Inst. and Consumer Credit*, 108th Cong. (2003) (testimony of C.R. Cloutier, President and CEO, MidSouth Bank) [hereinafter Testimony of Cloutier].

67. See *supra* note 2 and accompanying text.

68. See *Hearing on H.R. 5414*, *supra* note 2.

69. 149 CONG. REC. S12,632 (2003) (statement of Paul S. Sarbanes, Democratic Senator from Maryland).

70. John Adams, *Perks Beyond Compliance Will Cost \$\$\$*, BANK TECHNOLOGY NEWS, at <http://www.banktechnews.com/article.html?id=200407014GU5OWTS> (last modified Jul. 2004).

71. See *id.*

72. 12 U.S.C.A. § 5002(16) (2003). The substitute check is a paper copy created from the electronic image of the original check that meets the requirements set forth in the Act. *Id.*

21 does not mandate that banks and other financial institutions receive checks in electronic form.⁷³ Smaller banks that cannot afford the electronic imaging equipment may receive paper substitute checks instead of the electronic form of the check.⁷⁴ Substitute checks are the legal equivalent of the original check and must include the magnetic code.⁷⁵ This allows any bank to process substitute checks using existing equipment.⁷⁶

IV. CHECK 21: ADVANTAGES FOR CONSUMERS

Check 21 also provides potential benefits to consumers.⁷⁷ One member of Congress described Check 21 as “good for the customers . . . good for consumers . . . good for the economy.”⁷⁸ Check 21 promotes efficiency and cost-savings in the banking system by reducing the need to physically transport original checks.⁷⁹ According to industry estimates, financial institutions may see savings of \$2 to \$3 billion annually as a result of Check 21.⁸⁰ One Congressional Representative argued that consumers will benefit from lower costs as banks compete for their business, thus passing the savings from Check 21 on to their customers.⁸¹

Another benefit to consumers flows from the purpose of Check 21 to promote technological innovation in the financial industry.⁸² With the development of new and better technologies, banks will offer new products and services for consumers.⁸³ For example, banks may be able to provide customers with access to on-line images of deposits and

73. H.R. REP. NO. 108-132, at 10 (2003).

74. *See id.* at 11.

75. S. REP. NO. 108-79, at 2 (2003).

76. H.R. REP. NO. 108-132, at 11.

77. *See infra* notes 78-109 and accompanying text.

78. 149 CONG. REC. H4996 at 10 (2003) (statement of Congressman Bachus).

79. *See* 149 CONG. REC. H9289 (2003) (statement of Rep. Ford).

80. PRNewswire, *Check 21: No Time for Panic, But Pay Attention . . . Or Pay*, available at <http://www.prweb.com/releases/2004/10/prweb164168.htm> (last modified Oct. 4, 2004) [hereinafter *No Time for Panic*].

81. *See* 149 CONG. REC. H9289, at 4 (testimony of Rep. Ford).

82. *See supra* note 49 and accompanying text.

83. 149 CONG. REC. H9289, at 3 (statement of Rep. Ford).

payments.⁸⁴ Accessing images of checks online will take a fraction of the time that it takes to access checks in more traditional ways, including microfilm, physical archives, or locating the cancelled check itself.⁸⁵ This allows customers to review their accounts on a “real time” basis, enhancing consumer convenience.⁸⁶

Viewing consumer accounts on a “real time” basis also enhances fraud prevention.⁸⁷ The ability to access check images on the Internet helps consumers detect fraudulent transactions sooner, rather than waiting until the end of the month when they receive their traditional statement.⁸⁸ In fact, studies show that only thirty percent of account holders even bother to open their monthly bank statements.⁸⁹ The ability to access online check images may lead more consumers to play an active role in policing their checking accounts.⁹⁰

The development of new and better technologies may also benefit consumers in other ways.⁹¹ With electronic imaging, banks and ATM networks will no longer need to be tied geographically to their processing centers.⁹² One Congressional Representative testified that “[b]ecause electronic processing could eliminate the need for daily physical pick-ups of checks, consumers could enjoy extended cutoff hours and deposit services at ATMs in remote or underserved urban and rural areas.”⁹³ One industry representative testified before Congress that “[Check 21] could provide real benefits to rural community banks and their customers.”⁹⁴

Another benefit for consumers is the expedited right of recredit when a customer claims losses related to the creation of a substitute

84. Tara Rice, Fed. Res. Bank of Chicago, *Check 21: What Does It Mean to Bankers and Consumers?*, at 5, available at http://www.chicagofed.org/emergingpaymentsand_policy/files/check_21_summary_january_2004.pdf (last modified Jan. 2004).

85. 149 CONG. REC. H4996 (2003).

86. H.R. REP. NO. 108-132, at 11 (2003).

87. *Id.*

88. 149 CONG. REC. H4996 (2003).

89. *See No Time for Panic*, *supra* note 80.

90. *See id.*

91. *See infra* notes 92-94 and accompanying text.

92. S. REP. NO. 108-79 (2003).

93. 149 CONG. REC. H9289 (2003) (statement of Rep. Ford).

94. Testimony of Hage, *supra* note 57.

check.⁹⁵ This expedited recredit right is intended to place consumers who receive substitute checks in the same position as if they had received the original paper check.⁹⁶ The Act sets forth the circumstances that give rise to a claim and the procedures for making a claim.⁹⁷ When a consumer makes a proper claim, the bank must recredit the consumer's account with the contested amount if the investigation will take longer than ten days.⁹⁸ This gives customers and not banks access to the contested money until the investigation is complete and the validity of the claim is determined.⁹⁹

Several financial institutions have already implemented electronic imaging technology and have received favorable consumer response.¹⁰⁰ MidSouth Bank implemented check imaging in 1999.¹⁰¹ MidSouth's CEO¹⁰² testified before Congress that "[o]ur customer response was overwhelmingly positive."¹⁰³ The bank received complaints from only one quarter of one percent of their checking account customer base regarding the new system.¹⁰⁴ He further testified regarding the benefits his customers have realized.¹⁰⁵ "[W]e are able to expedite statement delivery along with improving the quality of statements. Account reconciliation has been simplified, and we can respond to inquiries in minutes instead of hours."¹⁰⁶

Credit unions have been using a truncation process since the mid-1970s.¹⁰⁷ A representative from the credit union industry told Congress that "[his organization] has not heard of an instance where a credit union member has experienced unusual hardship due to

95. See Budnitz, *supra* note 22.

96. Edmund D. Aycock, *Check 21: Availability of Funds and Collection of Checks*, REG. REV. (N.C. Bar Assoc.), Aug. 31, 2004, at 10.

97. See 12 U.S.C.A. § 5006 (2003).

98. 12 U.S.C.A. § 5006(c)(1).

99. See Budnitz, *supra* note 22.

100. See *infra* notes 101-06 and accompanying text.

101. Testimony of Cloutier, *supra* note 66.

102. C.R. Cloutier is the President and CEO of MidSouth Bank. *Id.*

103. Testimony of Cloutier, *supra* note 66.

104. *Id.*

105. See *infra* note 106 and accompanying text.

106. *Id.*

107. S. REP. NO. 108-79 (2003).

truncation.”¹⁰⁸ According to his testimony, he knew of only two consumer complaints resulting from the truncation requirement.¹⁰⁹

V. CHECK 21: POTENTIAL PITFALLS FOR CONSUMERS AND POLICY CHANGES ADVOCATED BY CONSUMERS RIGHTS GROUPS

Check 21 is not a perfect solution for all parties involved.¹¹⁰ While the benefits of Check 21 are numerous for the banking industry, there are some distinct disadvantages and potential pitfalls for consumers.¹¹¹ Several consumer rights groups did not support Check 21 for this simple fact.¹¹² These groups have set forth some policy changes that, if implemented by financial institutions, will make Check 21 less disruptive for consumers.¹¹³ Consumer rights advocates have asked financial institutions to adopt these policies.¹¹⁴

Prior to the Act, it was estimated that 45.8 million U.S. households received back their original paper checks.¹¹⁵ Under the new law, these households no longer have the right to demand back their original paper checks.¹¹⁶ Instead, these and other consumers have the right to demand a substitute check, which is the legal equivalent of the original paper check.¹¹⁷ This substitute check will also trigger the consumer's right of recredit¹¹⁸ to resolve disputes.¹¹⁹ The main problem for consumers is that the substitute check is the *only* instrument that is

108. *Check Clearing for the 21st Century Act: Hearing on H.R. 5414 Before the House Subcomm. on Fin. Inst. and Consumer Credit*, 107th Cong. (2002) (testimony of Robert Fenner, General Counsel, National Credit Union Administration).

109. *Id.*

110. *See Check Clearing for the 21st Century Act: Hearing on H.R. 5414 Before the House Subcomm. on Fin. Inst. and Consumer Credit*, 107th Cong. (2002) (testimony of Gail Hillebrand, Senior Attorney, West Coast Regional Office, Consumers Union of U.S.) [hereinafter *Testimony of Hillebrand*].

111. *See id.*; *see also* Budnitz, *supra* note 22.

112. *See* *Testimony of Hillebrand*, *supra* note 110.

113. *See* Consumers Union, *Policies Banks and Other Financial Institutions Could Adopt to Improve Check 21 for Consumers*, at 1, available at http://www.consumersunion.org/pub/core_financial_services/001317.html (Aug. 11, 2004) [hereinafter *Policies*].

114. *See id.*

115. *Testimony of Hillebrand*, *supra* note 110.

116. *See* 12 U.S.C.A. § 5003(a) (2003).

117. *Id.*

118. *Supra* note 98 and accompanying text.

119. *See* 12 U.S.C.A. § 5006 (2003).

the legal equivalent of the original check and that will trigger the right of recredit.¹²⁰

Nothing in the Act requires financial institutions to give consumers a substitute check unless the consumer specifically requests it.¹²¹ A bank may respond to a customer's request for a copy of his or her check in one of two ways: either provide the consumer a substitute check, with all the rights attached, or provide an image of the check that does not meet the requirements of a substitute check and thus does not afford the consumer any rights under the Act.¹²² The bank is under no obligation to inform the consumer of these choices or the difference between the two types of image copies.¹²³ If the bank gives the consumer a simple image copy, and not a substitute check, the consumer will have no right of recredit against the bank if the consumer alleges that the check was improperly paid.¹²⁴

Consumer rights groups want banks to adopt a policy of sending a substitute check to every customer who asks for a copy of their check, regardless of whether the customer specifically asks for a substitute check.¹²⁵ Consumer's Union is concerned that "consumers who call and ask for a copy of a check won't be told that there are two kinds of copies, and only one type of copy triggers legal rights."¹²⁶ For that reason, Consumer's Union implores financial institutions to take the high road and adopt a policy sending a substitute check to every consumer who asks for a copy or for their original check.¹²⁷

The danger extends even farther.¹²⁸ There is nothing in the Act that prohibits a bank or other financial institution from eliminating the recredit right entirely by requiring that customers waive the right in

120. See Availability of Funds and Collection of Checks, 69 Fed. Reg. 47,290, 47,301 (Aug. 4, 2004) (to be codified at 12 C.F.R. pt. 229) (refusing to allow anything other than the substitute check to trigger the right of recredit, "Giving consumers an expedited recredit right in the additional situations suggested by the commenters thus would exceed both the text and the underlying intent of the statute."); see also Budnitz, *supra* note 22.

121. See Consumers Union, *supra* note 47.

122. See 12 U.S.C.A. § 5003(a).

123. Consumers Union, *supra* note 47.

124. Testimony of Hillebrand, *supra* note 110.

125. *Policies*, *supra* note 113.

126. *Id.*

127. See *id.*

128. See *infra* notes 129-133 and accompanying text.

order to receive back substitute checks.¹²⁹ A bank may also stipulate that a customer opening a certain type of checking account will not receive substitute checks.¹³⁰ This leads to the conclusion that banks may charge high fees to consumers who open a checking account that does provide substitute checks.¹³¹ There is already proof that some banks are willing to charge customers who request the return of original checks or substitute checks.¹³² Even before the enactment of Check 21, many banks on the West Coast charged a monthly fee for accounts that received cancelled checks.¹³³

Consumer advocate groups want financial institutions not to charge a higher price for checking accounts that return substitute checks every month.¹³⁴ Banks should offer accounts that return substitute checks each month for the same price and in the same fashion as accounts that received back original paid checks before the implementation of Check 21.¹³⁵ As testified before Congress, electronic imaging of checks provides cost savings for banks.¹³⁶ Thus, banks have no reason to charge more for an account that returns substitute checks to the consumers than what the bank previously charged for an account that returned original checks.¹³⁷ Bank of America has already adopted a similar policy.¹³⁸ Customers who receive back their original checks in their monthly statement will not be charged an additional fee for substitute checks that are included in their statements.¹³⁹

Several consumer rights organizations also spot a related potential disadvantage for consumers involving substitute checks.¹⁴⁰

129. See *Policies*, *supra* note 113.

130. See *id.*

131. See *id.*

132. See MSNBC News, *A New Era in Banking Begins*, available at <http://www.msnbc.msn.com/id/5880440/> (last updated Oct. 28, 2004) [hereinafter MSNBC].

133. *Id.*

134. *Policies*, *supra* note 113.

135. *Id.*

136. See *supra* notes 64-66 and accompanying text.

137. See *Policies*, *supra* note 113.

138. Bank of America, *Checking and Savings: Check 21*, available at https://fleethomelink.fleet.com/cgi-bin/imcprpd.dll/Ctrl.jsp?page=bottomLevel&cntType=UCPSUPPORT&catID=&cntID=MCP_CS_FAQ&Failed_Page=/Ctrl.jsp (last visited Jan. 21, 2004).

139. *Id.*

140. See *Policies*, *supra* note 113; see also Consumer Reports, *So Long to Cancelled*

These groups argue that there is nothing in the Act that limits the fee amount banks may charge to provide substitute checks for consumers.¹⁴¹ A Consumer's Union attorney testified before the House on that subject. "The Act does not protect against high fees when the consumer needs to request the original check or a so-called 'substitute check.'"¹⁴² Consumer rights advocates fear that the legal importance of the substitute check will provide an incentive for financial institutions to impose high fees to obtain it.¹⁴³ Only a substitute check will trigger the right of recredit under Check 21.¹⁴⁴ Congress intended for consumers to be protected from losses related to the creation of a substitute check under Check 21.¹⁴⁵ Charging consumers a high fee for substitute checks could discourage consumers from exercising the rights conferred by Congress.¹⁴⁶ The Consumer's Union believes a high fee designed to deter requests for a substitute check, which is necessary to trigger a statutory right, to be an unfair business practice.¹⁴⁷

For this reason consumer advocates urge banks not to charge customers a fee for substitute checks.¹⁴⁸ Banks are expected to save around \$2 billion as a result of the Check 21.¹⁴⁹ Banks should not capitalize on this new legislation and turn Check 21 into a new fee opportunity.¹⁵⁰

The American Bankers Association (ABA) responded to the Consumer's Union's fear of increased fees for substitute checks.¹⁵¹ The ABA stated that "there is no indication that the banking industry will

Checks, available at <http://www.consumerreports.org/static/0408ins0.html> (last modified Aug. 2004) [hereinafter *ConsumerReports*].

141. *ConsumerReports*, *supra* note 140.

142. Testimony of Hillebrand, *supra* note 110.

143. *See id.*; *see also* Budnitz, *supra* note 22.

144. *See supra* note 120 and accompanying text.

145. *See* Budnitz, *supra* note 22.

146. *Policies*, *supra* note 113.

147. *Id.*

148. *Id.*

149. *Id.*

150. *See id.*

151. *See* Letter from Nessa Feddis, Senior Federal Counsel, American Bankers Association, to Gail Hillebrand, Senior Attorney, West Coast Office, Consumers Union, available at <http://www.aba.com/NR/rdonlyres/CBDC1A5C-43E3-43CC-B733-BE417C638618/37177/CUresponsefinalsept04.pdf> (Sept. 10, 2004) [hereinafter *Feddis*].

charge a special fee just because an item is a substitute check.”¹⁵² In addition, the ABA argued that bank fees are subject to market forces, and the banking industry is a highly competitive market.¹⁵³ Competition will ensure that bank fees of all kinds are kept at a reasonable level.¹⁵⁴

The Federal Reserve Board discusses the legal equivalency of substitute checks in its regulation, stating, “[A] person that receives a substitute check cannot be assessed costs associated with the creation of the substitute check, absent agreement to the contrary.”¹⁵⁵ One commentator took this to mean that a consumer who receives a substitute check cannot be charged a fee for the check.¹⁵⁶ The Federal Reserve Board gave no commentary to expound on the meaning or breadth of this phrase.¹⁵⁷ As a result, it is not entirely clear how far this prohibition extends.¹⁵⁸ It seems that the caveat, “absent agreement to the contrary,” gives banks greater flexibility.¹⁵⁹ Arguably a bank could charge a higher fee for checking accounts that receive substitute checks as long as the customer agrees to it.¹⁶⁰

Consumers may also face additional and higher fees in other areas as a result of Check 21, specifically in the area of bounced check fees.¹⁶¹ Electronic check processing will reduce the amount of time that it takes for checks to clear.¹⁶² Consumer advocates argue that many consumers rely on this “float” to cover a check when there are insufficient funds in their account at the time the check was written.¹⁶³ With faster clearing times, more checks may bounce, subjecting more consumers to bounced check fees.¹⁶⁴ This may provide an incentive for

152. *Id.* at 2.

153. *Id.*

154. *Id.*

155. Availability of Funds and Collection of Checks, 69 Fed. Reg. 47,322 (Aug. 4, 2004) (to be codified at 12 C.F.R. pt. 229).

156. See Budnitz, *supra* note 22.

157. See Availability of Funds and Collection of Checks, 69 Fed. Reg. at 47,298.

158. See *id.* (giving no guidance as to the meaning of this regulation or how far it extends).

159. See Availability of Funds and Collection of Checks, 69 Fed. Reg. at 47,322.

160. See *Id.*

161. Consumers Union, *supra* note 47.

162. See 12 U.S.C.A. § 5001(b) (2003).

163. ConsumerReports, *supra* note 140.

164. See *id.*

banks to increase bounced check fees.¹⁶⁵

It is reported that even before Check 21, bounced check fees provided banks with a large profit.¹⁶⁶ One Congressional Representative stated that banks made \$6.1 billion in profits in 1999 just from bounced check fees.¹⁶⁷ Profits for banks from bounced check fees are expected to rise when Check 21 takes effect.¹⁶⁸ Estimates indicate that Check 21 will generate as much as \$170 million a month in additional bounced check fees for banks.¹⁶⁹

However, the loss of the check float may not pose as large a problem as some consumers fear.¹⁷⁰ Some banking industry estimates show that even prior to Check 21, about ninety-five percent of checks actually cleared in only one day.¹⁷¹ Further industry surveys report that only eight percent of consumers actually write checks "because they like [the] float."¹⁷² Some industry experts predict that it will take as long as ten years before the float is truly gone.¹⁷³ Check imaging will be a gradual process as banks slowly implement the new technology.¹⁷⁴ Wachovia expects that it will be 2007 before digital imaging is used for seventy percent of its check transactions.¹⁷⁵ Although there is some discrepancy as to how many consumers will be affected and how soon they will be affected, it is the consensus that consumers will feel some effects from the loss of the float.¹⁷⁶

It is also important to note that "playing the float" is illegal.¹⁷⁷ It

165. Consumers Union, *supra* note 47.

166. 149 CONG. REC. H4996, 3 (2003).

167. *Id.* Testimony of Anthony Weiner, Democratic Congressman for New York. *Id.*

168. 10NEWS.com, *Check 21 Law Benefits Banks; More Fees for Consumers*, available at <http://www.10news.com/troubleshooter/3681944/detail.html> (last modified Aug. 25, 2004).

169. *Id.*

170. See MSNBC, *supra* note 132.

171. *Id.*

172. *Id.*

173. Getahn Wall, *Check "Floating" Springs Some Leaks*, TENNESEAN, Aug. 28, 2004, available at <http://www.tennessean.com/business/archives/04/08/56521032.shtml>.

174. Daniel Wolf, *Reality Check for Consumers Union Campaign*, AM. BANKER, at 25, available at <http://www.americanbanker.com/printthis.html?id=20410258OOZ> (last modified Oct. 26, 2004).

175. *Id.*

176. See MSNBC, *supra* note 132 (agreeing that there will be some consumers who are affected by the loss of the float).

177. Middlesex Savings Bank, *Check 21 Information*, available at <http://www.middlesex>

is illegal for a consumer to draft a check knowing the money is not in his or her account.¹⁷⁸ A spokesman for the Massachusetts Bankers Association states that “the float has never been legal, it’s fraud.”¹⁷⁹ Consumers need to remember that a check is not and never has been a loan.¹⁸⁰

Consumer rights advocates are also concerned that the Act’s notice requirements are not sufficiently extensive.¹⁸¹ Check 21 requires banks to give notice of the new procedures to all new customers and existing customers who receive original checks or substitute checks.¹⁸² Notice must also be given to anyone requesting a check and receiving a substitute check.¹⁸³ The problem with this notice requirement is that it excludes a large section of consumers.¹⁸⁴ Banks are not required to give notice of Check 21 to customers who do not receive back their original checks.¹⁸⁵ Thus, a customer who was not receiving back original checks prior to October 2004 may never be told about the availability of the substitute check.¹⁸⁶ The only other time that customer is required to be notified is if she requests a substitute check from the bank; therein lies the problem.¹⁸⁷ How is the consumer to know that she must request a substitute check when she has never been informed of her right to ask for it?¹⁸⁸ She may ask for a copy of her check and only be provided with an inferior image of her check that will not trigger any of her rights under this Act.¹⁸⁹

The Federal Reserve Board received several suggestions that the

bank.com/check21.asp? (last visited Jan. 18, 2005) (stating that “playing the float has always been illegal”).

178. *Id.*

179. Jennifer Heldt Powell, *Consumers Who Play Float Will Sink*, BOSTON HERALD, Sept. 29, 2004, at <http://business.bostonherald.com/businessNews/view.bg?articleid=46483&format=>.

180. MSNBC, *supra* note 132.

181. *See Policies*, *supra* note 113.

182. 12 U.S.C.A. § 5011 (2003).

183. *Id.*

184. *See Policies*, *supra* note 113.

185. 12 U.S.C.A. § 5011.

186. *See Policies*, *supra* note 113.

187. 12 U.S.C.A. § 5011.

188. *See Policies*, *supra* note 113.

189. *See id.*

Regulations require banks to provide disclosure to all consumers, not just those receiving substitute checks.¹⁹⁰ The Federal Reserve Board refused.¹⁹¹ “Requiring notice for consumers who do not receive substitute checks would go beyond the requirements of the statute and could confuse consumers who receive a notice describing rights that they do not have.”¹⁹²

Consumer’s Union urges financial institutions to give notice to all customers about Check 21.¹⁹³ Several members of the banking industry have agreed with this suggestion.¹⁹⁴ The ABA recommends that banks educate all customers about Check 21, whether or not the law requires it.¹⁹⁵ The ABA has learned that many banks already plan to provide information above and beyond what the law requires.¹⁹⁶ These banks plan on sending notices regarding Check 21 to all of their customers as well as providing information on bank websites.¹⁹⁷ First Citizens Bank mailed letters to all existing customers explaining Check 21 and its ramifications.¹⁹⁸ Other members of the banking industry have urged financial institutions to provide specific notice that customers should no longer try to “float” their checks.¹⁹⁹

Consumer rights advocates also suggest that financial institutions educate commercial customers about substitute checks under Check 21.²⁰⁰ Even though substitute checks are the legal equivalent to original paper checks, they will look different.²⁰¹ Consumer’s Union worries that “consumers may have trouble getting merchants and landlords to accept a substitute check as proof of

190. Availability of Funds and Collection of Checks, 69 Fed. Reg. 47,304 (Aug. 4, 2004) (to be codified at 12 C.F.R. pt. 229).

191. *Id.*

192. *Id.*

193. *Policies*, *supra* note 113, at 3.

194. *See* Feddis, *supra* note 151.

195. *Id.*

196. *Id.*

197. *Id.*

198. Telephone Interview, Bank Teller, First Citizens Bank, Raleigh, NC (Nov. 20, 2004).

199. John M. Floyd, BankersOnline.com, *Preparing for Check 21*, available at http://www.bankersonline.com/vendor_guru/jmf/jmf_op080204b.html (last visited Jan. 18, 2005).

200. *Policies*, *supra* note 113.

201. Consumers Union, *supra* note 47.

payment if financial institutions haven't explained the substitute check concept to their commercial customers."²⁰²

Another disadvantage of Check 21 for consumers is that the substitute check will not be as useful as the original check for proving forgery or alteration.²⁰³ Substitute checks cannot be used to determine pen pressure and other clues.²⁰⁴ A representative of the Consumer's Union testified of this danger, "the substitute check . . . would not show things that can't be copied, such as the pressure applied to the pen by the forger."²⁰⁵ Substitute checks are also less useful than the original checks for handwriting analysis.²⁰⁶ However, it should be noted that cases in which examination of an original check is necessary to determine fraud or forgery are relatively rare.²⁰⁷

Consumer advocates also worry that consumers will not have earlier access to their funds that are clearing faster as a result of Check 21.²⁰⁸ The primary purpose of Check 21 is "to foster innovation in the check collection system . . . [and] to improve the overall efficiency of the Nation's payments system."²⁰⁹ Several members of the banking industry testified before Congress that electronic imaging of checks would accelerate the check clearing process.²¹⁰ Although Check 21 does not require banks to give consumers access to deposited funds sooner, consumer rights advocates argue that it is only fair to do so.²¹¹ If the deposits are actually clearing sooner, then consumers should have earlier access to funds.²¹² A national banking industry survey reports that seventy-five percent of bankers do believe that deposits will be made available to consumers more quickly.²¹³

202. *Policies*, *supra* note 113.

203. Consumers Union, *supra* note 47.

204. Budnitz, *supra* note 22.

205. Testimony of Hillebrand, *supra* note 110.

206. Consumers Union, *supra* note 47.

207. Availability of Funds and Collection of Checks, 69 Fed. Reg. 47,292 (Aug. 4, 2004) (to be codified at 12 C.F.R. pt. 229) (set forth by the staff of the Financial Management Service of the Department of Treasury).

208. *See infra* notes 211-212 and accompanying text.

209. *See supra* note 49 and accompanying text.

210. *See supra* notes 58 and accompanying text.

211. *See Policies*, *supra* note 113, at 3.

212. *See id.*

213. BAI, *Check 21 Industry Readiness: October 2004 Survey Results*, available at <http://www.bai.org/check21/surveyresults/#graph> (last modified Oct. 2004). Nearly one-

A final potential problem that worries consumer rights advocates is that banks may be able to use information from the electronic images of checks to invade the privacy of consumers or businesses.²¹⁴ Check 21 places no limits on a bank's use of information contained in its customers' check images.²¹⁵ Banks may create large databases of information about their check-writing customers.²¹⁶ A consumer rights advocate testified before the House that "a database of check images could even allow a bank to determine which of its customers write checks to a religious institution, who gives to particular groups that reflect particular lifestyles or interests, or who makes political contributions to a particular party."²¹⁷

VI. CONCLUSION

Check 21 paves the way for our nation's payments system to enter the 21st century.²¹⁸ Financial institutions must be able to explore new technologies and adopt new procedures that will save money and promote efficiency.²¹⁹ Unfortunately, these changes are not always easy. Some consumers may face disadvantages in the short term.²²⁰ To Congress, these disadvantages are a small price to pay for a more efficient banking industry.²²¹ However, consumer advocates argue that more consumer protections are necessary and that banks must rise to the challenge and implement these protections.²²² The coming months and years will show if the detriment to consumers from Check 21 is truly as worrisome as consumer advocates proclaim; and if so, whether the

third of the responses to question were neither agree nor disagree, but among those who had an opinion, the tally was three to one that banks will make deposits available to consumers.
Id.

214. Testimony of Hillebrand, *supra* note 110.

215. Consumers Union, *supra* note 47.

216. Testimony of Hillebrand, *supra* note 110.

217. *Id.* at 4.

218. See *supra* note 53 and accompanying text.

219. See *supra* notes 49-69 and accompanying text.

220. See *supra* notes 110-217 and accompanying text.

221. See *supra* notes 21 and accompanying text.

222. See *supra* notes 110-217 and accompanying text.

banking industry took the noble path of consumer protection or the lucrative path of consumer exploitation.

ANDREA MCGLINN

